91-395

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MELTON WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 4A1.2(a)(2) of the Federal Sentencing Guidelines, which requires that prior sentences imposed in related cases be treated as one sentence for purposes of criminal history calculations, requires two state convictions to be treated as "related cases" where they are consolidated for sentencing pursuant to state law.

2. Whether a district court may consider prior criminal history in denying a reduction of two offense levels for "Acceptance of Responsibility" under § 3E1.1 of the Federal Sentencing Guidelines.

PARTIES TO THE PROCEEDING BELOW

The defendant-petitioner is Melton Williams.

The Government-respondent is the United States of America.

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MELTON WILLIAMS,

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v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Melton Williams, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

REFERENCE TO OPINIONS

The Court of Appeals opinion below was not reported. The Court of Appeals assigned the case docket No. 90-8550. The district court's judgment was not

reported. The cause number in the district court was No. A-89-CR-244-01.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 4, 1991. No motion for rehearing was filed and this petition for certiorari was filed within 90 days of the date of judgment, allowing for the Labor Day holiday. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

United States Sentencing Commission, *Guidelines Manual*, § 4A1.2 (Nov. 1990) states in pertinent part:

> (a) **Prior Sentence Defined**
>
> (1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.
>
> (2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

> (3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

U.S.S.G. § 4A1.2, comment. (n.3) states in pertinent part:

> **Related Cases**: Cases are considered related if they (1) occurred on a single occasion; (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. *See* §4A1.3.

U.S.S.G. § 4A1.3 states in pertinent part:

> **Adequacy of Criminal History Category (Policy Statement)**
>
> If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider

imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a) prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal offenses);

(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;

(e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense or (5) for appropriate reasons, such as cooperation in the

> prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under §4A1.3.

U.S.S.G. § 3E1.1 states in pertinent part:

> **Acceptance of Responsibility**
>
> (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.
>
> (b) A defendant maybe given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.
>
> (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

The Texas Code of Criminal Procedure, art. 42.08, states:

> When the same defendant has been convicted in two or more cases . . . judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. . . .

Tex. Code Crim. Proc. Ann. art. 42.08(a) (Vernon Supp. 1991).

STATEMENT OF THE CASE

By Grand Jury indictment filed on December 5, 1989, in the Austin Division of the Western District of Texas, Mr. Williams was charged with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 846 and manufacture of methamphetamine in violation of 21 U.S.C. § 841(a)(1). Pursuant to a plea agreement, Mr. Williams pleaded guilty to a charge of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). Mr. Williams thereafter was sentenced to 240 months in imprisonment, a 5-year period of supervised release, and a special assessment of $50.00. The charges of conspiracy to manufacture methamphetamine and manufacture of methamphetamine were dismissed on the Government's motion. A timely appeal was noticed.

Mr. Williams was sentenced on September 12, 1990. (4 R. 2)[1] During this sentencing proceeding, the defense objected to the presentence report because of its treatment of criminal history and its recommendation of a denial of a reduction in offense levels for acceptance of responsibility. (4 R. 13) The Court considered a letter filed with the Court objecting to the presentence investigation report in this regard. This letter was sealed, along with the presentence investigation report, and is a part of the record in this case. The Court additionally received into evidence Defendant's Exhibit 1, copies of judgments of

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[1] In the references to the Record on Appeal, the numeral to the left of "R." refers to a volume of the Record on Appeal as assigned by the Clerk of this Court. Numbers to the right of "R." denote the page(s) found within the Record volume referenced.

conviction that were entered in a Texas state court on December 18, 1987. (4 R. 14) The properly certified copies of these judgments of conviction previously had been filed with the Court as attachments to the letter objecting to the presentence investigation report.

The defense pointed out to the Court that the presentence investigation report assessed three points for each of these convictions in determining the criminal history category, but that, according to article 42.08 of the Texas Code of Criminal Procedure, these offenses were consolidated for sentencing as a matter of law and thus constituted related cases under the Federal Sentencing Guidelines. (4 R. 14-15) The defense requested that the Court find these offenses to be related cases and assess only three criminal history points in accordance with the Sentencing Guidelines.

The Government pointed out that, although the Defendant was sentenced on the same date, and the sentences were set to run concurrently, that the offenses involved distinct instances of conduct. (4 R. 15) The Government expressly admitted that the offenses "were just consolidated for purposes of sentencing." (4 R. 16)

Despite the Government's admission that the offenses were consolidated for sentencing, the Court ruled that the offenses were not related cases and assessed three criminal history points for each offense. (4 R. 16)

The defense also pointed out that notwithstanding Mr. Williams' prompt voluntary and truthful admission to authorities of involvement in the offense made at the time of his arrest and his voluntary assistance to the authorities at the time of his arrest, the probation officer had recommended no reduction of two offense levels for

acceptance of responsibility for the most part because of Mr. Williams' prior criminal history, including arrests with no strong evidence of commission of the crime. At the sentencing hearing the Government agreed that Mr. Williams had attempted to cooperate with the authorities and had no problem with a two point reduction.

The Court, apparently relying only on Mr. Williams' prior criminal history, refused to reduce the offense levels by two points for acceptance of responsibility. (4 R. 13)

REASONS FOR GRANTING THE WRIT

I. **The decision below raises important questions of interpretation of § 4A1.2 of the Federal Sentencing Guidelines concerning whether previous convictions consolidated for sentencing pursuant to state law are "related cases" that must be treated as one previous conviction for calculating the proper criminal history. This issue has not been, but should be, settled by this Court.**

II. **The Fifth Circuit's interpretation of Application Note 3 of § 4A1.2 of the Federal Sentencing Guidelines conflicts with the interpretation given that provision by the Ninth Circuit.**

III. **The decision below raises an important question of interpretation of § 3E1.1 of the Federal Sentencing Guidelines concerning whether a district court can deny sentencing reductions for acceptance of responsibility based on the defendant's past criminal history. This issue has not been, but should be, decided by this Court.**

ARGUMENT AND AUTHORITIES

I.

The Meaning of "Related Cases" Under § 4A1.2(a)(2) of the Federal Sentencing Guidelines.

A. Guidelines § 4A1.2 and "Related Cases".

The Supreme Court should grant certiorari in this case to clarify the interpretation of U.S.S.G. § 4A1.2.[2] Section 4A1.2 concerns the treatment of prior sentences in calculating the criminal history of an offender for Guidelines purposes. This criminal history calculation is used to determine the degree of severity of a sentence. Section 4A1.2(a)(2) requires the court to treat "Prior sentences imposed in related cases" as one sentence for the purposes of calculating the criminal history. "Related cases" is not defined in the Guidelines, but Application Note 3 to § 4A1.2 says that cases are related if "(3) they were consolidated for trial or sentencing." Treating multiple offenses with concurrent sentences as "related cases" reduces the criminal history calculation, resulting in a lower available sentencing range.

A number of federal courts have faced the argument that when a state court holds one hearing for sentencing on multiple pending offenses and enters concurrent sentences on those offenses that they are considered "consolidated for sentencing" as that term is used in Application

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[2] Unless otherwise indicated, all section references are to sections of the United States Sentencing Commission, *Guidelines Manual*. All references to Application Note 3 are to U.S.S.G. § 4A1.2, comment (n.3).

Note 3. Indeed Application Note 3 implies this interpretation by cautioning that "if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes." Because this issue substantially impacts the application of the Federal Sentencing Guidelines in a number of instances, this Court should clarify this issue.

B. The Impact and Interpretation of Federal Sentencing Guidelines.

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provided for the development of guidelines that would further the basic purposes of sentencing: deterrence, incapacitation, just punishment, and rehabilitation. Congress created the United States Sentencing Commission as an independent agency in the Judicial Branch whose principal purpose was to establish sentencing policies and practices for the federal criminal justice system that would assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. United States Sentencing Commission, Guidelines Manual, Part A – Introduction (November 1990). Federal district courts are required to follow these sentencing guidelines in assessing sentences for those convicted of federal offenses except where the guidelines

themselves justify upward or downward departure. *See generally Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The guidelines anticipated that those convicted of federal crimes would have had prior criminal histories and provided a mechanism by which a sentencing court could examine prior criminal history to determine the appropriate sentence. The guidelines specifically address the issue of treating prior sentences in "related cases." Whether cases are related when the facts concerning the offenses are not in dispute is a legal determination. *United States v. Gross*, 897 F.2d 414, 416 (9th Cir. 1990). It is here that district and appellate courts require guidance from this Court in interpreting the treatment of offenses consolidated for sentencing purposes.

C. Concurrently Sentenced Offenses as Related Cases.

Both the wording of § 4A1.2(a)(2) and Application Note 3 require treatment of offenses concurrently sentenced as "related cases" for the purposes of calculating criminal history. The Guidelines themselves do not define "related cases." Application Note 3 under § 4A1.2 says, "Cases are considered related if they (1) occurred on a single occasion, (2) are part of a single common scheme or plan, or (3) are consolidated for trial or sentencing." It is not unusual for courts, particularly in the state court systems, to consolidate pending multiple offenses where guilty pleas are to be entered on all pending offenses and enter concurrent sentences on the offenses. Application Note 3 does not require formal consolidation for trial or sentencing. Application Note 3 clearly lends itself to the interpretation that if the court holds one hearing at which

it considers several different offenses, and, in one sitting, declares concurrent sentences on those offenses, those offenses have been "consolidated for sentencing." Accordingly, they qualify as "related cases."

The United States Sentencing Commission, in Application Note 3, recognized that it had given a very broad definition to "related cases." In fact, after defining what is meant by "related cases," the Commission went on to say, "The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that under represents the seriousness of the defendant's criminal history and the danger he presents to the public." Application Note 3.

The Commission's answer to the broad definition was to caution the court to consider upward departure from the guidelines in the event that the criminal history underrepresents the seriousness of the individual's past conduct. Section 4A1.3, which discusses circumstances where departure from the Guidelines is appropriate, cautions, "A departure under this provision is warranted when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." As an example of the kinds of situations that might justify upward departure, the Commission cited an instance where a defendant "(2) had received a prior consolidated sentence of ten years for a series of serious assaults . . . . " § 4A1.3(2). This policy statement in § 4A1.3, as with Application Note 3, recognizes that under the Guidelines, multiple prior offenses concurrently sentenced at one time by a court should be considered "related cases."

Some courts, in cases involving separate sentences at different times by different courts but declared to run concurrently have rejected the idea that these cases were "consolidated for the trial or sentencing" and thus qualified as related cases. *United States v. Gross*, 897 F.2d 414 (9th Cir. 1990); *United States v. Ainsworth*, 932 F.2d 358 (5th Cir. 1991); *United States v. Hines*, No. 90-5514, 1991 U.S. App. LEXIS 17161 (4th Cir. 1991); *United States v. Rivers*, 929 F.2d 136 (4th Cir. 1991); *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990). Consolidation is a creature of judicial convenience where the court handles multiple matters at one time. Judicial convenience isn't served by having separate judges in separate courts on separate days impose sentences that are declared to run concurrently with one another. The latter instance does not reflect the kind of judicial economy normally encompassed in the term "consolidation." In Mr. Williams' case, as well as others similarly situated, where the same judge hears both cases at the same time and imposes sentence at the same hearing, whether the offenses were "consolidated" in strict adherence to state law requirements for consolidation is not as important as whether they should be considered "consolidated" under the Federal Sentencing Guidelines. Given the broad definition in Application Note 3, when the same court or the same judge at the same hearing imposes concurrent sentences the practical result is consolidation requiring treatment as one sentence for the purposes of criminal history. This is even more important when reviewing sentences imposed by Texas courts.

D. The Effect of Tex. Code Crim. Proc. art. 42.08.

The presentence investigation report ("PSIR") prepared by Mr. Joe F. Marshall of the U.S. Probation Office

indicates that Mr. Williams pleaded guilty on December 18, 1987, to a charge of possession of a controlled substance and a charge of aggravated possession of a controlled substance. (1 R. 0007) The PSIR (paragraphs 28 and 29) and the certified copies of the convictions (Defendant's Exhibit 1) attached to Mr. Williams' letter objecting to the PSIR show that, although the charges concerned incidents occurring at different times and, although each charge was maintained under a distinct cause number, Mr. Williams was convicted and sentenced on both charges by the same judge, at the same time, with the sentences set to run concurrently. (1 R. 0007)

There is no requirement under Texas Code Crim. Proc. Ann., art. 42.08 for formal consolidation, such as listing under a single cause or docket number, to effect consolidation. Thus no formalities need be evidenced in the record of state convictions to show that the consolidation under art. 42.08 occurred. Tex. Code Crim. Proc. Ann. art. 42.08(a) (Vernon Supp. 1991). At the sentencing hearing, the Government admitted that the cases were "consolidated for sentencing." (4 R. 16)

Under § 4A1.2(a)(2) of the Guidelines, Mr. Williams' two 1987 convictions qualified as "related" cases and, therefore, only three points should have been assessed for his criminal history rather than the six points used by the district court. The extra three points raised Mr. Williams from criminal history category V to VI (from 11 to 14 points). This allowed the district court to impose a sentence of 240 months confinement rather than a lower sentence that would otherwise have resulted.

E. The Conflict in the Circuits.

A conflict exists in the Circuits on the meaning of Application Note 3 and its definition of "related cases." All of the Circuits have apparently come to the decision that the mere presence of concurrent sentences alone is insufficient to make multiple offenses "related cases," but the Fifth Circuit and the Ninth Circuit differ on the interpretation of Application Note 3. The Fifth Circuit in *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990) and *United States v. Ainsworth*, 932 F.2d 358 (5th Cir. 1991), has held that concurrent sentencing on the same day is not the equivalent of cases being "consolidated for sentencing" under Application Note 3 and therefore cases concurrently sentenced on the same day are not considered "related cases unless they are formally consolidated." On the other hand, the Ninth Circuit in *United States v. Gross*, 897 F.2d 414 (9th Cir. 1990), recognized that Application Note 3 to § 4A1.2 suggests that cases sentenced concurrently are deemed to be related. 897 F.2d at 416. Despite this recognition, the Ninth Circuit has declared that the Application Note is not binding law, only commentary, and has refused to apply its definition of "related cases." 897 F.2d at 416-17. *See also United States v. Davis*, 922 F.2d 1385, 1390 (9th Cir. 1991). This Court should clarify the meaning of "related cases" under § 4A1.2.

II.

USING CRIMINAL HISTORY TO DENY CREDIT FOR ACCEPTANCE OF RESPONSIBILITY

Mr. Williams qualified for a reduction of two offense levels for Acceptance of Responsibility because his

conduct and cooperation with the Government met the criteria for such a reduction. It was undisputed that Mr. Williams, shortly after his apprehension, confessed his guilt to a DEA agent and tried to assist the DEA in setting up controlled purchases with other drug dealers. At the sentencing hearing after Mr. Williams pled guilty, the Government acknowledged that Mr. Williams had cooperated and "Based on that, we have no problem with a two-point reduction." Nevertheless, the District Court was apparently persuaded in denying the two offense level reduction by the PSIR that recommended denial of the reduction because of Mr. Williams' past criminal history in narcotics.

By taking into account Mr. Williams' criminal history in the decision on acceptance of responsibility, the district court in effect counted Mr. Williams' previous offenses twice. The Sentencing Guidelines use criminal history computations to extend the applicable sentence for a particular offense level; the same criminal history is not allowed to be used again to deny a reduction for acceptance of responsibility except as specifically in the career criminal calculation, which provides a set offense level based on prior convictions. § 4B1.1, Federal Sentencing Guidelines. Section 3E1.1 of the Federal Sentencing Guidelines looks to the conduct at or near the time of arrest. Without such an approach, anyone with a criminal history could never qualify as accepting responsibility.

Consideration of pre-plea conduct (criminal history) alone to decide acceptance of responsibility is inappropriate. *United States v. Watt*, 910 F.2d 587 (9th Cir. 1990). The Sentencing Guidelines provide that even career criminals can qualify for a two level reduction. See *United States v.*

Maddalena, 893 F.2d 815, 818 (6th Cir. 1989); § 4B1.1, Sentencing Guidelines. The Guidelines clearly contemplate that past criminal conduct not be used to deny the availability of acceptance of responsibility credit.

The Sentencing Guidelines provide appropriate considerations for acceptance of responsibility: Mr. Williams qualified under at least three of them (voluntary and truthful admission, voluntary assistance, and timeliness of conduct). The Commentary on § 3E1.1 of the Sentencing Guidelines says that

> The reduction of offense Level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense and related conduct by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Even the Government acknowledges that Mr. Williams had accepted responsibility in dealings with the DEA and under the plea bargain. Mr. Williams met the requirements and was entitled to a reduction in this calculation and an appropriate reduction in his sentence.

CONCLUSION

This case presents the Court with an opportunity to clarify sentencing treatment in a number of cases that will come before district courts. The Court's direction on the proper treatment of "related cases" and "acceptance of responsibility" will also afford Mr. Williams the opportunity to qualify for the sentence that the United States Sentencing Commission considered appropriate for his offense. Mr. Williams does not ask for mercy; he merely asks for justice.

Respectfully submitted,

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Melton Williams

APPENDIX A

JUDGMENT OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT
WESTERN District of TEXAS

UNITED STATES OF AMERICA V. MELTON WILLIAMS (Name of Defendant)	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) (Filed Sep. 13, 1990) Case Number: A-89-CR-244(1) USAO Number: 89-04928 David Donaldson Defendant's Attorney

THE DEFENDANT:

xx pleaded guilty to count(s) 1 of the superseding information at rearraignment on July 9, 1990.

__ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1)	POSSESSION WITH INTENT TO DISTRIBUTE METH-AMPHETAMINE	11/29/89	S1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count(s) _____ ; and is discharged as to such count(s).

xx Count(s) 1 and 2 of the indictment (is) (are) dismissed on the motion of the United States.

xx It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) 1 of the superseding information , which shall be due xx immediately __ as follows:

The special assessment shall be paid to the CLERK, U. S. DISTRICT COURT.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
567-21-2029

Defendant's Date of Birth:
01/03/47

Defendant's Mailing Address:
c/o HAYS COUNTY JAIL
1307 Old Uhland Road
San Marcos, Texas 78666

Defendant's Residence Address:

see above

SEPTEMBER 12, 1990
Date of Imposition of Sentence

/s/ James R. Nowlin
Signature of Judicial Officer

JAMES R. NOWLIN,
U. S. DISTRICT JUDGE
Name & Title of Judicial Officer

SEPTEMBER 12, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED AND FORTY (240) MONTHS .

The defendant is continued in custody pending service of sentence.

xx The court makes the following recommendations to the Bureau of Prisons: that the defendant be confined at a federal correctional institution where he may receive treatment and counselling for drug abuse.

[Form material deleted in printing.]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

xx The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

__ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

xx The defendant shall not possess a firearm or destructive device.

The defendant shall refrain from the illegal use of controlled substances (as defined in Section 102 of the Controlled Substance Act) and shall submit to periodic drug testing at the direction of the U. S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) the defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape or form, without ~~express authority of the Court~~.

STATEMENT OF REASONS

xx The court adopts the factual findings and guideline application in the presentence report.

OR

__ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 3 to 5 years

Fine Range: $17,500 to $1,000,000

xx Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

__ Full restitution is not ordered for the following reason(s):

xx The sentence is within the guidelines range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

__ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

__ upon motion of the government, as a result of defendant's substantial assistance.

__ for the following reason(s):

_____

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8550
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELTON WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-89-CR-244-01)

(June 4, 1991)

Before POLITZ and DAVIS, Circuit Judges.*

POLITZ, Circuit Judge:**

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* This matter is being decided by a quorum. 28 U.S.C. § 46(d).

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Sentenced to the statutory maximum of 240 months after pleading guilty to possession of methamphetamine with intent to distribute, Melton Williams appeals, challenging his sentence. Finding no error, we affirm.

Background

Indicted for conspiracy to manufacture methamphetamine and for manufacturing the controlled substance, pursuant to a plea agreement Williams pleaded guilty to an information charging possession with intent to distribute. During the sentencing proceedings Williams made two principal objections: (1) two prior offenses should have been combined and treated as one in the computation of his criminal history category; and (2) he should have been given the two-point reduction for acceptance of responsibility in the computation of his offense level.

The objections mandate a close review of Williams' history in the Texas criminal justice system. We begin that review on January 15, 1987 when he was arrested by Austin police and charged with possession of a controlled substance. He was released on bond. In October 1987 he was arrested as a bond violator and found to be in possession of a large quantity of methamphetamine and a pistol. The latter arrest led to a charge of aggravated possession of a controlled substance. The arrests led to separate charges in separate district courts in Travis County. On December 18, 1987 he entered pleas of guilty to both charges before the same judge and was sentenced to prison for five years on each count, with the sentences to run concurrently. The charges were taken up back-to-back but they were not consolidated for plea or sentencing.

Williams was paroled in May 1988 but failed to report to his probation officer and that parole was revoked in September 1988. While executing a parole search warrant in Williams' apartment the police discovered a substantial quantity of methamphetamine, as well as materials and equipment used in its manufacture, together with other drug paraphernalia. He was charged with aggravated possession of a controlled substance and on December 5, 1988 he was sentenced to prison for nine years. He was again paroled in June 1989 and within five months the instant offense occurred.

The probation officer recommended an offense level of 32 and a criminal history category of VI which results in a guideline incarceration range of 210 to 262 months. In computing these totals the probation officer declined to give a two-point reduction in the offense level for acceptance of responsibility and assigned three points each to the January 1987 and October 1987 offenses in the computation of Williams' criminal history category. Williams objected to these recommendations, insisting that the two-point reduction should have been granted and that the two offenses should have been treated as related and counted as one. The district court rejected Williams' objections and imposed a sentence within the computed guidelines, as capped by the statutory maximum. Williams timely appealed.

Analysis

In reviewing claims of sentencing error we must examine findings of fact under the clearly-erroneous standard and must affirm if the sentencing guidelines

were properly applied to appropriately-found facts. United States v. Velasquez-Mercado, 872 F.2d 632 (5th Cir.), *cert. denied*, 110 S.Ct. 187 (1989).

Williams maintains that the two 1987 offenses were related cases to be treated as one conviction as provided in section 4A1.2(a)(2) of the United States Sentencing Guidelines (U.S.S.G.). "Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." U.S.S.G. § 4A1.2, comment. (n.3). Williams contends that the two charges were consolidated for sentencing under art. 42.08 of the Texas Code of Criminal Procedure which provides that when a defendant has been convicted in more than one case, "judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction." Article 42.08 grants the judge the discretion to enter either consecutive or concurrent sentences. Williams construes this article as mandating the consolidation for sentencing of all pending multiple convictions. He argues that the absence of a formal consolidation is irrelevant since the Texas statute requires no formalities.

We are not persuaded. "Prior sentences imposed in unrelated cases are to be counted separately." U.S.S.G. § 4A1.2(a)(2). There is no requirement that two convictions carrying concurrent sentences must be considered consolidated. United States v. Flores, 875 F.2d 1110 (5th Cir. 1989). We recently addressed the issue of consolidation in United States v. Giles, No. 90-8299 (5th Cir., May 15, 1991), and United States v. Metcalf, 898 F.2d 43 (5th Cir. 1990). We have held that because two different offenses were sentenced on one day does not necessitate

a finding that the cases were consolidated. Metcalf, 898 at 46. In Giles we were persuaded that the cases were not consolidated because they proceeded to sentencing under separate docket numbers and no order of consolidation was entered. Giles, No. 90-8299 at 5. Such is the case at bar. The two 1987 offenses were related in that both involved drugs. But they were entirely separate and discrete violations of the law, occurring nine months apart. There was no requirement of consolidation for either charge or sentence and the record reflects neither formal nor informal consolidation for plea or sentencing. The court had the discretion to impose consecutive or concurrent sentences. For purposes of the sentencing guidelines computation, these were separate and discrete offenses and could be counted as such. We perceive no error in the district court's action.

We likewise view Williams' claim that he was entitled to a two-point reduction in the offense level because he confessed his guilt and attempted to assist the DEA in setting up a transaction with another dealer. He further contends that the district court should not have considered his previous criminal activity, including the repeated bond and parole violations, in refusing to make this reduction.

A two-level reduction for acceptance of responsibility is appropriate only "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility." U.S.S.G. § 3E1.1(a). "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review *and should not be disturbed unless it is*

without foundation." U.S.S.G. § 3E1.1, comment. (n.5).[1] Because of this highly *deferential standard*, a sentencing judge's ruling on this issue will rarely be overturned. *See* United States v. Fabregat, 902 F.2d 331 (5th Cir. 1990); United States v. Thomas, 870 F.2d 174 (5th Cir. 1989).

The two-level reduction does not automatically follow the entry of a guilty plea. Several factors must be considered including voluntary withdrawal from criminal conduct, voluntary and truthful admission of involvement in the offense and related conduct, voluntary surrender promptly after commission of the offense, and the timeliness of the defendant's conduct manifesting acceptance of responsibility. U.S.S.G. § 3E1.1, comment. (n.1). Although Williams insists that he cooperated with authorities, the district court found that he admitted only facts already known by the authorities, he did not voluntarily withdraw from criminal activities, ceasing only when arrested, and he was not candid and forthcoming with the agents or probation officer. The record adequately supports these findings; we cannot say that they are clearly erroneous. We thus find no error.

The sentence is AFFIRMED.

By /s/ P. Keller

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[1] The underlined portion of the note was deleted in the amendments to the Guidelines that became effective November 1, 1990, two months after this sentencing took place. However our result would be the same under the guideline as amended.